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Supreme Court, U.S.
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No. 02-1678

In The

Supreme Court of the United States

LARRY SMALL; R. SCHELKE; E. CASTRO; D. JOHNSON; M.A. CORBIN; J. BULTMAN,

Petitioners,

v.

NARVIS G. NONNETTE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S JURISPRUDENCE

Petitioners seek review on the ground that the Ninth Circuit's decision in *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2003) (Judges Canby and Paez, and Judge Lay from the Eighth Circuit) conflicts with this Court's prior opinions. It does not conflict; instead it is consistent with the position of the five Justices (concurring and one dissenting) in *Spencer v. Kemna*, 523 U.S. 1 (1998).

The issue before the Ninth Circuit was whether a petitioner's 42 U.S.C. § 1983 lawsuit regarding loss of good time credits and the imposition of administrative segregation should be dismissed because he was no longer in custody. The Ninth Circuit held that the suit was not barred and that Nonnette could proceed in § 1983 even though he had not received a favorable habeas ruling. *See Nonnette*, 316 F.3d at 875-76. As discussed below, the Ninth Circuit's ruling does not conflict with this Court's prior opinions in this area.

While Petitioners trace this Court's developing jurisprudence from *Presier v. Rodriguez*, 411 U.S. 475 (1973) to *Heck v. Humphrey*, 512 U.S. 477 (1994) to *Edwards v. Balisok*, 520 U.S. 641 (1996) and through to *Spencer v. Kemna*, 523 U.S. 1 (1998), none of those cases issued a holding on the factual predicate and issue here: whether a prisoner may upon release maintain his pending § 1983 action – an action that was filed while in custody – because, upon release, he is no longer in custody for purposes of challenging the revocation of good time credits. The Ninth Circuit correctly held that he may.

Neither *Heck* nor *Edwards* foreclose the Ninth Circuit's decision here. Both involved a § 1983 action by one who was in custody at all relevant times. *See Heck*, 512 U.S. 447; *Edwards*, 520 U.S. 641. As such, habeas was an available remedy. That distinction is critical, because this case involves a § 1983 action by a person who was in prison at the time of filing but who, during the case, was released from prison to parole, and as to the loss of good time credits was no longer "in custody" for purposes of the habeas statute. *See Nonnette*, 316 F.3d at 875-76. Thus, habeas offered no remedy upon release to challenge the loss of good time credits, i.e., to regain the lost time served. *See id.*

In fact, and as to *Heck,* not only did *Heck* not address the issue here, but Justice Souter concurred there, noting that for future cases (such as this one): "The Court's opinion can be read as saying nothing more than that now, after enactment of the habeas statute and because of it, *prison inmates* seeking § 1983 damages in federal court must satisfy a requirement analogous to the malicious-prosecution tort's favorable termination requirement." *Heck*, 512 U.S. at 500 (emphasis added). Justice Souter further added that this was the only appropriate way to interpret *Heck* because a contrary reading – essentially that urged by Petitioners below – "would needlessly place at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not 'in custody' for habeas purposes." *Id.*

To be sure, *Spencer*, 523 U.S. 1, is the closest case that has come before this Court that speaks to this issue. There, this Court held that a prisoner's habeas petition was moot upon his release. *Id.* at 17. One of petitioner's contentions was that to moot his habeas petition would

forever foreclose § 1983 relief. *Id.* Five members of this Court in concurrences and a dissent rejected his contention, and noted that *Heck* did not hold that a released prisoner in Spencer's position was out of court in his § 1983 action. *See id.* at 19-21, 21-22 and 25 n.8. Those five Justices were: Justices Stevens, O'Connor, Souter, Breyer and Ginsburg (collectively hereafter "the *Spencer* Five"). *See id.* Justice Stevens dissented from the holding in *Spencer* but noted in footnote 28 that he agreed with Justice Souter's concurrence. *See id.* at 25 n.8.

The *Spencer* Five noted that the better view – better, that is, than any view potentially espoused by the remaining four Justices in *Spencer* or that could be divined from *Heck* or *Edwards* – is that a former prisoner no longer in custody, as in the case here, *"may bring a § 1983 action establishing the unconstitutionality of a conviction of confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law to satisfy." Id.* at 20-21 (emphasis added) (Justice Souter's concurrence, joined by Justices O'Connor, Breyer and Ginsburg).

Thus, it was within this framework that the Ninth Circuit considered the question of whether *Heck's* favorable termination requirement should apply to constitutional claims by a prisoner no longer in custody. The Ninth Circuit held that it should not, and that holding is consistent with the *Spencer* Five. Upon release, Nonnette as a matter of law, as found by the Ninth Circuit, could not secure habeas relief for the same reasons that Spencer could not challenge in habeas the collateral consequences attendant to a parole violation. That is, incarceration for parole violations, once served, is forever over and not subject to relief in habeas; by the same token, good time

credits, once lost, are forever lost and a case in habeas would lack Article III standing. *See Nonnette*, 316 F.3d at 875-76. Accordingly, the Ninth Circuit, like the Second and Seventh Circuits (*see Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001) and *Carr v. O'Leary*, 167 F.3d 1124, 1125 (7th Cir. 1999)), properly adjudicated an open question in a manner not inconsistent with this Court's prior pronouncements in the space (*Heck* and *Edwards*), and consistent with the *Spencer* Five. Further, when a prisoner is no longer in custody, the habeas statute is inapplicable and there is no conflict between the habeas and § 1983 statutes; that was the case here when the Ninth Circuit ruled.

Nonnette does not dispute that the First, Fifth and Sixth Circuits have reached contrary conclusions. *See Huey v. Stine*, 230 F.3d 226, 229 (6th Cir. 2000); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000); *Figueroa v. Rivera*, 147 F.3d 77, 80-81 (1st Cir. 1998). However, Nonnette does contend they erred in refusing to acknowledge both the fact that the question was an open one and, still further, that the *Spencer* Five should be considered in answering that open question. And, the fact that the Ninth Circuit here did not cite to those contrary opinions, as the Petitioners point out in their *certiorari* petition, does not compel a conclusion that the Ninth Circuit erred or that this Court should grant *certiorari*.

Consequently, this Court should reject Petitioners' contention that the Ninth Circuit violated the *Heck-Edwards* rule.

II. PETITIONERS' PARADE OF HORRIBLES HAS NOTHING TO DO WITH THIS CASE

Petitioners paint a parade of horribles resulting from the Ninth Circuit's opinion: a prisoner sits on his constitutional claim, waits to be released and then sues in § 1983 when no longer in custody (and hence no longer capable of securing habeas relief) and where, because he did not go to habeas, he has not received an adverse result in a habeas court. But that is not this case. Nonnette immediately filed a § 1983 action, and did not simply avoid doing anything in order to be released from custody so that he could then go to § 1983. Put simply, there is no reason for this Court to issue an opinion to address a hypothetical situation presented by Petitioners when that situation is not even present on these facts.[1]

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[1] Moreover, it is in their Petition that Petitioners, for the first time, mention "procedural default" as a means to justify denying Nonnette relief, ostensibly because he went to § 1983 instead of habeas. This has not been argued before and should be deemed waived at this point for this litigation. Nonnette disputes that he is procedurally defaulted by virtue of filing a § 1983 action instead of a habeas petition.

CONCLUSION

For these reasons, the petition should be denied.

Respectfully submitted,

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